Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES STUART FALLER II,

Petitioner,

Versus

UNITED STATES of AMERICA,

Respondent.

Petition for a Writ of Certiorari to the
Eleventh Circuit United States Court of Appeals

PETITION FOR A WRIT OF CERTIORARI
With Appendix

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QUESTIONS PRESENTED

1. Whether the courts below denied the Petitioner due process by refusing to issue a certificate of appealability as instructed by *Slack v. McDaniel*, 529 U.S. 473 (2000)
2. Whether the courts below in denying the petitioner's claims of due process violations in his wire fraud trial is in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, by, *inter alia*, by accepting unsworn and unsigned affidavits of the government and adopting them in response to sworn affidavits of counsel which demonstrated *Brady* violations by the government and violated the Fifth, Sixth and Fourteenth Amendments?
3. Whether the courts below failure to hold an evidentiary hearing on the merits of the 2255 claim of the Petitioner and failed to use proper standards in violation of this Court's directive in *Schriro v. Landrigan*, 550 U.S. 465 (2007) is a violation of due process protected under the Fifth, Six and Fourteenth Amendments of the Constitution?
4. Whether the courts below in denying the Petitioner access to *Brady*, ***Supra*** material that the petitioner proved the Government continues to withhold is in direct violation of the Fifth, Sixth and Fourteenth Amendments of the Constitution and a violation of the procedural rules of mandated by Congress and the Courts?
5. This Court granted cert review where the case is currently pending in *Cone v. Bell*, 128 S. Ct. 2961 where the Tennessee courts refused to

consider petitioner's claim under Brady v. Maryland, 373 U.S. 83 (1963), through procedural hurdles.

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TABLE OF AUTHORITIES

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Schriro v. Landrigan, 550 U.S. 465 (2007)
Slack v. McDaniel, 529 U.S. 473 (2000)

Giglio v. United States, 405, U.S. 150 (1972)
Kyles v. Whitley, 514 U.S. 419 (1995)
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Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

REPORTS, ORDERS & OPINIONS BELOW

February 16th, 2007 District Court Order Regarding Known, Withheld *Brady* Material appears at Appendix A.

The February 22nd, 2008 Report and Recommendation of the District Court of the Southern District of Florida appears at Appendix B to the petition [*Faller v. USA*, 06-CV-60554, Southern District of Florida.]

The findings of the 11th Circuit Court of Appeals un-published opinion [Faller v. USA 03-10929 dated September 27th, 2005] appears at Appendix C.

The March 25th, 2008 Order adopting the Report and Recommendation and denying the 2255 petition appears at Appendix D.

The April 5th, 2008 District Court Denial of Certificate of Appeal appears at Appendix E.

The September 2nd, 2008 11th Circuit Court of Appeals denial of Certificate of Appealability [*Faller v. USA*, 08-11650] for a Certificate of Appealability appears at Appendix F.

The October 17th, 2008 11th Circuit Court of Appeals denial of Certificate of Appealability on rehearing appears at Appendix G.

JURISDICTION

The date on which the Court of Appeals for the 11th Circuit entered its final order was October 17th,

2008. [*James S. Faller II v. United States of America*, 08-11650].

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 and United States Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Five of the *United States Constitution* provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment Six of the *United States Constitution* provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been

> previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment Fourteen of the *United States Constitution* provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. 3500 (The Jencks Act)

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until

said witness has testified on direct examination in the trial of the case.
(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

28 U.S.C. 2255 Rule 6. Discovery

(a) Leave of Court Required. A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law. If necessary for effective discovery, the judge must appoint an attorney for a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

(b) Requesting Discovery. A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for

admission, and must specify any requested documents.

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) *Information Subject to Disclosure.*

(E) *Documents and Objects.*

Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(F) *Reports of Examinations and Tests.*

Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows -- or through due diligence could know -- that the item exists; and

(iii) the item is material to preparing the defense or the government intends

to use the item in its case-in-chief at trial.

STATEMENT

The underlying case is an advance fee loan scam involving numerous proceedings regarding *Brady* and other discovery violations. There have been many hearings and pleadings regarding the violation which always indicated the Government continued to withhold more *Brady* material that would have produced an acquittal at trial. Trial concluded in May 2000. Despite the landmark decision in *Brady v. Maryland*, 373 U.S. 83 (1963), the Government continued to violate the due process rights of the Petitioner and the Court mishandled the application of the *Brady* standard by not engaging sufficient sanctions to compel the Government to produce the material they were withholding.

As *Brady* material was obtained the Petitioner filed motions for a new trial pursuant to Fed. R. Crim. Proc. 33[1] however, absent all of the new *Brady* material the Petitioner could not overcome the 11th Circuit's version of what constitutes a *Brady* claim.

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[1] **Federal Rule of Criminal Procedure (1)** ***Newly Discovered Evidence.***

Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

The District Court refused to incarcerate the Petitioner and appeals ensued to no avail without the *Brady* material the Petitioner sought [Also see prior decision of 11th Circuit (relied in part in previous appeal)] which appears at Appendix C.

The Government continued to maintain that they had turned over all of the documents which they had in their control "*and maintained an open discovery policy.*" Notably, the District Court who presided at trial made continual statements that the Court was highly concerned about the "*playing of games*" with evidence and "*this was the most difficult case the court had had in his 17 years of doing this.*"

In or about July of 2003 an attorney for the main defendant (Richard Adam who had been outside the United States, fighting extradition,) contacted the Petitioner and informed the instant Petitioner that mass volumes of documents containing *Brady* material showing the innocence of the Petitioner had just been produced by the Government to Defendant Adam.

The Government moved heaven and earth to cause the *Brady* material to be kept from the hands of the Petitioner. The Petitioner filed a motion in District Court for an order preserving the new material and the motion was granted.

On May 13th, 2004 Richard Adam was sentenced and the District Court made the following observation: [See Adam Sentencing Transcript Page 7 at 10-23]

> *"THE COURT: Have you had a chance to fully debrief him with regard to the Defendants Faller and Murray?*
> *(Prosecution)*
> *MR. McADAMS: No, sir, we have not. I mean, we have talked about it somewhat.*

Mr. – both informally and formally with the former case agent. Mr. Lupkey (phonetic) is no longer here, and Mr. Grenwald has now recently taken over for him.
THE COURT: Well, as I have expressed in the past, I don't know everything you know, but I've heard the trial and I have some ambivalent feeling about their involvement or whether they might have been victims in a way also. And I always felt that if they had been tried along with Mr. Adam the case might have been different. And maybe not. Maybe I was just reading something there and it wasn't there."

When the Petitioner was released and placed on supervised release (after a third arrest in the case) the Petitioner began to obtain the new *Brady* material. The new material ended up totaling more than 50,000 documents, several thousand containing *Brady* material.

The Petitioner filed a petition pursuant to 28 U.S.C. 2255 [*Faller v. USA* 06-CV- 60554] based upon due process violations. During the preparation of the 2255 case the Petitioner gleaned substantial proof within the new *Brady* material which proved that the Government continued to withhold substantial volumes of additional *Brady* material that they continue to withhold as of today.

The Petitioner filed for an order from the Court directing the Government to produce the discovery pursuant to 28 U.S.C. 2255 (rule 6). The Court held a hearing on the motion and entered an Order which appears at Appendix A. The Court Ordered the Government to produce limited items requested and then made the following finding in the Court's Order. [See Order Para. 1 at page 2]

> *"The Court takes specific note of the fact that Petitioner already has a wealth of information in his possession for use in support of his Habeas Petition. From that information, as demonstrated at the hearing, Petitioner has ample materials to rely upon in support of his Petition."*

Following the entry of the order appearing at Appendix A, the Government notified the Court they no longer had the material sought and blamed a hurricane. The Petitioner filed a motion for a summary judgment or a hearing referred by *Slack v. McDaniel*, 529 U.S. 473 (2000). Additionally the Petitioner discovered other material and witnesses that the Petitioner is able to prove the Government is withholding so the Petitioner filed for leave to take additional discovery as well as to file excess documents in the record to preserve the right of the Petitioner to appeal with a full record, if necessary.

A year later the Magistrate Court entered a report and recommendation to deny the 2255 petition which appears at Appendix B and also referred to findings in the previous appeal appearing at Appendix C.

The Magistrate Court made findings of fact that were diametrically opposed to the Court's earlier finding that the Petitioner already demonstrated the validity of his Petition. Further the Court made conclusions and findings of fact which were diametrically opposed to the 50,000+ new *Brady* documents and recordings. Had the Court held the required hearing the Court could not have made such a finding.

The Court held that the Government did in fact provide open access to the discovery material and based that finding upon unsigned affidavits, other affidavits that a hearing would have revealed as a fraud on the Court and simply ignored the affidavits of counsel for Adam and Counsel for the Petitioner (at trial and pre-2255.)

The Petitioner filed all the necessary objections and the District Court denied them in its order of March 25th, 2008 which appears at Appendix D.

Following the denial of the 2255 petition the Petitioner filed a motion for the issuance of a Certificate of Appealability with the District Court who held the Petitioner was not entitled to a certificate. The order of the District Court appears at Appendix E.

Following the denial by the District Court the Petitioner filed a notice of appeal and requested that the Court of Appeals issue the certificate. The Court of Appeals denied the certificate on September 2nd, 2008. The denial appears at Appendix F.

The Petitioner then filed a motion for reconsideration and the Court of Appeals, under the same Judge again denied the issuance of a certificate of Appealability on October 17th, 2008 which appears at Appendix G.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With This Court's Opinion in *Slack v. McDaniel*, 529 U.S. 473 (2000)

Following the February 13th, 2007 multi-hour hearing regarding additional discovery material being withheld by the Government, the Court concluded that the petitioner already had enough in his possession to rely upon in support of his [2255] petition at Appendix A.

There is no argument by anyone that the Petitioner sought out the additional material any way possible and the Court denied it as a matter of not necessary to prove up the *Brady* claims in the [2255] petition.

After expressing its belief that the Petitioner was able to prove his claims and previous concerns the Petitioner may in fact be a "*victim*" the Court did an about face and made findings of fact that simply would not be possible with the required hearing as spelled out in *Slack*.

By denying the Petitioner a hearing the Court is rewriting due process when a Petitioner has clearly shown *Brady* material has been withheld. That rewriting is in conflict with other circuits and is a diminishment of the fundamental fairness reasonably expected by a party to an action. The Court's denial of the required hearing pursuant to rule 8 of 2255 was necessary to preclude the Petitioner from proving up his claims.

Further, the Court denied the Petitioner a record for appeal by refusal to issue a certificate of appealability pursuant to 28 U.S.C. 2253 (c) which, based upon the facts and new evidence would allow the Petitioner to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Perhaps the most important reason for granting this Petition is that the sorts of denials of right by lower Courts, as in here, are a further

erosion of the Constitutionally Protected Rights as described later herein. *Slack* held; To obtain a certificate of appealability under 28 U.S.C. § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that includes showing that reasonable jurists could debate whether or, for that matter, agree that the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.

From the Order appearing at Appendix A this Court can easily deduce that the Petitioner's claim was not frivolous and the Petitioner at that point triggered the right to an evidentiary hearing.

The disparity in treatment of the instant matter and between the Circuits can be best demonstrated in *Vick v. United States*, 730 F.2d 707 (11th Cir. 1984) The Court held "an evidentiary hearing, available in a section 2255 proceeding, is often required for development of an adequate record. *United States v. Griffin*, 699 F.2d 1102 (11th Cir. 1983). As we stated in *Griffin v. United States*, 588 F.2d 521 (5th Cir. 1979), however, this rule does not require that the district court hold an evidentiary hearing every time a section 2255 petitioner **[**4]** asserts a claim of ineffective assistance of counsel. Section 2255 provides that, "unless the motion and files and records of the case conclusively show that petitioner is entitled to no relief," the court should conduct an evidentiary hearing."

The instant matter is compelling that a clear directive from this Court of what triggers the standards and tests where a hearing is mandatory to ensure the Constitutionally Protected Right to Due Process protected under the 5th and 14th

Amendments is strictly adhered to. In other Circuits the Courts have held "unless the motion and files and records [*1553] of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. Sec. 2255. *See Baker v. United States*, 781 F.2d 85, 92 (6th Cir. 1986). As the former Fifth Circuit stated in *Guerra v. United States*, 588 F.2d 519 (5th Cir. 1979).

From the Order at Appendix A and its conflicting nature with its findings, this Court can clearly see a need to establish Circuit wide threshold for a required evidentiary hearing. The Court simply denied the Petitioner a hearing, denied him evidence which would have precluded such an erroneous finding and prevented the Petitioner from creating a record which would have proven up his Due Process claims. To allow the Court to simply prevent a hearing, disallow access to evidence and testimony to dismiss a valid Petition also calls into action the supervisory powers of this Court. These needs for established criteria are cumulative with the below stated reasons.

II. The Decisions of the lower Court is inconsistent with the landmark findings of this Court and in conflict with other Circuit's application of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny

This Court has revisited or reinforced *Brady* on more than one occasion to prevent the Circuits from creating their own interpretations of how it should be applied. The instant matter demands more refinement based upon yet another manner in which

the Courts are drifting from the decision(s) pursuant to *Brady*.

This Court needs no reminder of the standards it set out in *Brady* however, the Court must create protections to the accused through standards requiring evidentiary hearings to prevent exactly this kind of manifest injustice. This Court held in *Giglio v. United States*, 405, U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263 (1999); *Banks v. Dretke* 540 U.S. 668 (2004); *Pennsylvania v. Ritchie*, 480 39 (1987); *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976) *Chapman v. California*, 386 U.S. 18 (1967) and a plethora of other resulting cases the standard of review revolves upon the discovery of a *Brady* violation the Petitioner must show that a different trial result was likely to have occurred.

Although the factual and procedural matters are for the later desired brief, a perfect example of why hearings must become mandatory upon certain Supreme Court mandated criteria is the following in this case;

The Court found in its report and recommendation appearing at B that the Petitioner continually told the victims of the company he worked at that he had personally funded loans before in taking the persons advance fee. The Court pointed to the testimony of trial witness Kent McElhaney who testified the Petitioner told McElhaney *"It was an easy loan. He (Petitioner) had made loans for billions of dollars."* [T.R. May 17, 2000, p. 521 at 1-4 also at Appendix B, p. 3.] What an evidentiary hearing would have proven out is that the Government withheld (3) three prior witness statements of McElhaney where McElhaney told the Government prior to trial (covered under the Jencks

Act 18 U.S.C. 3500) that when he asked the Petitioner if he had previously funded loans the new Brady material shows Petitioner responded *"he did not know if they funded loans as he just recently had gone with the company."* This is in the new *Brady* material. A hearing would have forced the record to reflect a clear due process violation and not a wrong conclusion in the report.

Other matters were that trial witnesses the Court found in its report and recommendation (At App. B) to be credible were actually in custody during his trial testimony while the prosecution represented to the jury witness a dignitary of another country. An evidentiary hearing would have proven this to be a serious *Brady* violation. A hearing would bear out virtually every single witness's trial testimony was equally compromised.

Without more definitive direction and case law from this Court in the administering *Brady* claims there are too many conflicts between the Circuits and too much discretion for a District to purge a case from the docket by the mere denial of an evidentiary hearing and the entry of findings of fact that were not otherwise possible.

For example, the Court in *McCoy v. Wainwright*, 630 F. Supp. 122 (11 Cir. 1986) the Court held that "A court must also integrate an understanding of the distinction between "weak" and "frivolous" with an awareness of the inexpert craftsmanship of a Petitioner who is proceeding *pro se*. A court must be cautious not to allow the absence of technical niceties to persuade **[**5]** it that the arguments do not fall within that "frontier of rationality." Instead, a court should consider whether an attorney could succeed in constructing an argument that does not cross over the border into

mere frivolity." *See Baker v. Ellis*, 194 F.2d 865, 866 (5th Cir. 1952); *Loper v. Ellis*, 224 F.2d 901, 903 (5th Cir. 1955); *Gordon v. Willis*, 516 F. Supp. 911, 913 (N.D. Ga. 1980). In the instant matter the case was such a clear violation of *Brady* and its progeny that the only possible way for the Petitioner to be denied relief is to be denied a hearing which afforded such a violation of due process which, in this case ultimately contributed to the claim of ineffective assistance of Counsel due to the withholding of *Brady, Jencks and Giglio* material as outlined in the 2255 Petition. "The purpose of the effective assistance guarantee [in the sixth amendment] is ... simply to ensure that criminal defendants receive a fair trial." *Strickland v. Washington*, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). "The benchmark for judging any claim of [constitutionally significant] ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied [**17] on as having produced a just result. The same principle applies to a capital sentencing proceeding." *Id. at 686.*

In McCoy v. Wainwright, 804 F.2d 1196 McCoy contends that it was error for the district court to fail to grant an evidentiary hearing on his ineffective assistance of counsel claim. The Supreme Court has enunciated a series of situations in which an evidentiary hearing is mandatory to determine the merits of a state prisoner's habeas corpus petition. *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963). The *Townsend* Court stated "where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either

at the time of the trial or in a collateral proceeding. In other words, a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing "reliably found the relevant facts." *Townsend*, 372 U.S. at 311, 83 S. Ct. at 756, 9 L. Ed. 2d at 785. The *Townsend* Court held that: [A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in [**8] the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

A perfect example of why it is necessary for this Court's supervisory powers to be invoked and laws established that eliminate the discretion afforded the District and Circuit when faced with such an adversarial showing of egregious *Brady* violations. Other Circuits have set different standards of review for Brady violations in deciding the necessity of a hearing. In the 8th Circuit they have established what is loosely referred to as the Lockhart standard "If [petitioner] alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim."

III. Whether the courts below failure to hold an evidentiary hearing on the merits of the 2255 claim of the Petitioner and failed to use proper standards in

violation of this Court's directive in *Schriro v. Landrigan*, 550 U.S. 465 (2007) is a violation of due process protected under the Fifth, Six and Fourteenth Amendments of the Constitution?

Again, coming out of 9th Circuit in *Schriro v. Landrigan*, 550 U.S. 465 (2007) is a different rule of law than what was applied to the instant matter calling into action this Court which held in Schriro; "[i]n deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. See, *e.g., Mayes v. Gibson*, 210 F.3d 1284, 1287 (CA10 2000). [***17] Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate. See *id.*, at 1287-1288 ("Whether [an applicant's] allegations, if proven, would entitle him to habeas relief is a question governed by [AEDPA]"). The Ninth Circuit has recognized this point in other cases, holding that "an evidentiary hearing is not required on issues that can be resolved by reference to the state court record." *Totten* v. *Merkle*, 137 F.3d 1172, 1176 (1998.) The instant matter was in no way discernable from the pleadings and record. A good example of that are the affidavits provided in dispute by the Government where the Government filed one unsigned document as an affirmation and affirmations from the prosecutor as well as a former public defender where the affidavits claim matters of fact that are virtually impossible. A clearer standard

of review between the Circuits would ensure a *Brady* claimant would be provided the due process he seeks.

IV. **Whether the courts below in denying the Petitioner access to *Brady* material that the petitioner proved the Government continues to withhold is in direct violation of the Fifth, Sixth and Fourteenth Amendments of the Constitution and a violation of the procedural rules of mandated by Congress and the Courts?**

Contained in Appendix A is the Order of the District Court where the Court determined the Petitioner had enough to rely upon in support of his petition. The Court then cited *Lynott v. Story*, 929 F.2d 228, 232 (6th Cir. 1991) where the Court held, *inter alia*, "[a] court must provide discovery in a habeas corpus proceeding only "where *specific allegations* before the court [**13] show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore, *entitled to relief. . . .*"

Without underlying guidance of this Court the Court was able to find the Petitioner did not need the sought material and then a year later ruled in such a way that would not have been possible, but for the denial of access to the sought material.

Again, to impress upon the Court the need for the engagement of this Court's supervisory powers as well, and more law to control such a violation of due process the following is a sample of why the relief is needed.

The Court held a discovery hearing and ruled the Petitioner was in possession of a wealth of material to prove up his Brady claim. The Court ruled the Government provide some material and denied the remaining request. One of the items the Petitioner sought were international documents showing trial witness Regis Hempel was in fact in custody and was going to be taken being escorted by the Luxembourg Police for his role in money laundering. During trial the Government introduced Hempel as a dignitary.

In the report and recommendation of the Court the findings of fact held to the Government's version that would have been thwarted at an evidentiary hearing. To add to this due process violation, the Government's response in the prosecution's affirmations was that they did not have hundreds of documents from Luxembourg that the Petitioner sought until long after trial. When the Petitioner was able to obtain them they showed the attached affidavits of the Government's translator that verified the Government had them a year prior to trial. Documents from the petitioner's co-counsel demonstrated the documents were specifically requested months before trial and their existence was denied by the Government. These documents show other materials the Court has refused to order be produced to the Petitioner.

Clear law would require the Government to turn them over regardless and it is up to the Petitioner how they are used. Other materials sought and denied demonstrating a clear need for intervention and clearer law in *Brady* requests and violations, is where the Petitioner demonstrated to the Court at the discovery hearing that key trial witness Dominick Maggio was under investigation at

time of trial for other unrelated frauds and that he appeared at the Attorney General's Office offering to plead guilty to *inter alia*, organized crime. The Court, not bound by any law that triggers obligation to order the material to be produced in a Habeas proceeding denied the request and then in its Report and Recommendation found that Maggio and the materials sought could have been obtained with due diligence. To date the only materials produced were from a lawyer who sued and obtained judgment against Maggio for stealing One Million Dollars. These are few examples of what would be shown at a hearing.

The Petitioner asks this Court to consider he is Pro se and to consider the cumulative effect of all the errors from the very beginning of this case. The District Court included in its report and subsequent Order the earlier findings of the 11th Circuit in a prior appeal appearing at Appendix C. Those findings would also be called into serious question at a hearing now that the Petitioner has been able to secure over 50,000 documents with thousands of them containing *Brady* material, as stated in the Report and Recommendation appearing at Appendix B.

It is also very important for this Court to exercise its supervisory powers in this case in the interest of protecting the public from the lower Courts taking new avenues to prevent a Petitioner from presenting his case or creating a fully appealable record.

Despite the protections currently in place to protect due process, and effective assistance rights of Counsel through statutory requirements as Fed. R. Crim. Proc. 16; Fed. R. Crim. Proc 33; the Jencks Act and the cases listed herein, the Government was able

to cause the lower Courts to find ways to bypass them and make a finding of fact and law which is diametrically opposed to the new *Brady* material simply by preventing an evidentiary hearing after intentionally withholding the exculpatory material for more than (5) five years after trial to increase the hurdles to the Petitioner.

V. This Court granted cert review where the case is currently pending in Cone v. Bell, 128 S. Ct. 2961 where the Tennessee courts refused to consider petitioner's claim under Brady v. Maryland, 373 U.S. 83 (1963), through procedural hurdles.

In *Cone* this Court has granted certiorari and has recognized the need for this Court to create consistent standards for due process violations review where procedural rules precluded the Petitioner from having his day in Court and establishing protections to a criminal defendant where the prosecution has withheld *Brady* material.

As in *Cone* the instant matter revolves around *Brady* violations. *Cone* appealed all the way through the Sixth Circuit Court of Appeals who all denied relief. Cone sought cert and this Court has realized the inherent dangers to an accused when the prosecution knowingly withholds Brady material, as in the instant matter and relies on procedural hurdles to protect the violations.

Like in *Cone*, the instant Petitioner wants "one shot" to have his day in Court with all of the evidence. Although a state origination in Cone adverse to the Federal nature of the instant matter, the Petitioner has been repeatedly denied relief

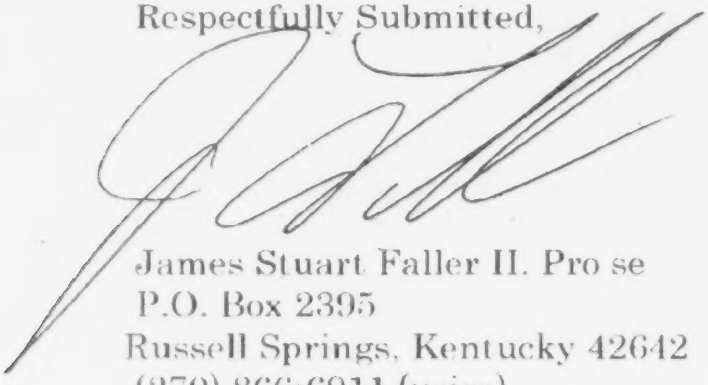
however, never has a Court found the claims to be frivolous, the Courts merely adopted the Government's version of facts and did so by procedurally denying a hearing which would have allowed the Petitioner to prove his case.

Had the new *Brady* material been discovered and obtained within (3) three years of trial the Petitioner would have been able to gain a hearing without a fight under Fed. R. Civ. Proc. 33. Because the prosecution hid the evidence and then fought to prevent the Petitioner for obtaining it for almost 5 years, and continues to withhold other material, the Petitioner has been denied a fair chance to present his defense. Courts have denied the Petitioner due process, much like *Cone*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,



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APPENDIX

IN THE

Supreme Court of the United States

JAMES STUART FALLER II,

Petitioner,

Versus

UNITED STATES of AMERICA,

Respondent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 06-60554-CIV-RYSKAMP/TORRES
(Criminal Case 97-6063-CR-Ryskamp)

JAMES FALLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER

This matter is before the Court on the Petitioner James Faller's Motion for Leave to Take Discovery and Motion to Compel Government to Provide Discovery [D.E. 24] and Petitioner's Motion to Join Barbara Murray's Motions to Compel Discovery. [D.E. 40]. The underlying Petition for Writ of Habeas Corpus is before the undersigned pursuant to an Order to Reference entered by the Honorable Kenneth L. Ryskamp, United States District Judge [D.E. 12].

The Court has carefully reviewed the Motions, the Government's Response [D.E. 31], and the Reply [D.E. 32]. The Court has also heard from the parties at a hearing conducted on February 13, 2007. After

full consideration, the Motion to Join [D.E. 40] will be **GRANTED.** The Motion for Leave to Take Discovery [D.E. 28] will be **GRANTED IN PART AND DENIED IN PART.**

The Court takes specific note of the fact that Petitioner already has a wealth of information in his possession for use in support of his Habeas Petition. From that information, as demonstrated at the hearing, Petitioner has ample materials to rely upon in support of his Petition. Therefore, Petitioner has failed to show sufficient prejudice from the absence of additional discovery from the Government in this case. The Court cannot grant the full relief requested by Petitioner. *See Lynott v. Story*, 929 F.2d 228, 232 (6th Cir. 1991) (court must provide discovery in habeas corpus proceeding only "where *specific allegations* before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrated that he is confined illegally and is there for, *entitled to relief*....").

The Motion is, however, **Granted** to the extent that the Government will be compelled to produce the following documents: FBI 302s for Regis Hemple, Roland Colon, Dominick F. Maggio, Ray Deck, and Kent McElhaney. Additionally, the Government shall provide any tape recorded interviews of Kent McElhaney or Ray Deck. All other requests by Petitioner are **Denied.**

The Government shall produce the above noted documents to Petitioner by no later than **March 2, 2007.**

Done and Ordered in Chambers at Fort Lauderdale, Florida, this 16th day of February, 2007.

/S/
EDWIN G. TORRES
United States Magistrate Judge

cc. The Honorable Kenneth L. Ryskamp
Lauren Jorgensen, AUSA (WPB)
James Faller II
P.O. Box 2395
Russell Springs, Kentucky 42642

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-60554-CIV-RYSKAMP/TORRES

JAMES FALLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,
_____ /

REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO TITLE 28 U.S.C. § 2255 AND ORDER ON MOTION FOR LEAVE TO FILE LARGE VOLUME OF DOCUMENTS

This matter is before the Court on James Faller's Petition for Writ of Habeas Corpus pursuant to title 28 U.S.C. § 2255 [D.E. 2].[1] The United States of America ("Government") responded [D.E. 21-1] and James Faller ("Petitioner") replied. [D.E. 26]. Each party filed a supplemental brief [D.E. 30, 61]. Petitioner then filed an additional reply [D.E. 62], an Emergency Notice of Receipt of New Brady Material [D.E. 63], and a Notice of

[1] This matter was referred to the undersigned magistrate judge for a report and recommendation pursuant to 28 U.S.C. § 636.

Additional Brady and Jencks Act Violations [D.E. 72]. Petitioner's Motion for Leave to File Large Volume of Documents, requesting leave to file 20,000 documents in support of this habeas petition, is similarly at issue. [D.E. 68].

The court has carefully reviewed the record and the arguments presented, as well as the prior proceedings and trial transcript in the underlying criminal case.[2] For the reasons that follow, we recommend that the court deny the Petition for Writ of Habeas Corpus. We also deny Petitioner's Motion for Leave to File Large Volume of Documents.

I. BACKGROUND

A. Case History

In May, 2000, Petitioner was convicted in federal court of conspiracy to commit mail and wire fraud, and money laundering.[3] According to the Government, Petitioner took part in a scheme wherein investors would pay

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[2] *See United States v. Adam, et al.*, No. 97-CR-6063-RYSKAMP/VITUNAC.

[3] We adopt the detailed facts underlying the fraud scheme as summarized in United States v. Murray, et al., 154 Fed. Appx. 740, 742-43 (11th Cir. 2005). With respect to this petition, the record further provides the basis for the summary of facts that are material to the issues presented, as well as any findings that may be found in the analysis portion of this report and recommendation.

an advanced fee in exchange for a large loan. The objective was simple: keep the advance fees without providing the loans. Despite the fact that Petitioner's company International Business Service Alliance ("IBSA") had yet to fund a single loan, in his sales pitch Petitioner promised his prospective investors that IBSA *had* previously funded loans. As the Government explained in closing arguments:

"All of [the fraud victims] reported having been told by Murray or Faller and in a few cases by both of them, that IBSA had funded loans previously. Several of them were told by Mr. Faller that they had personally funded loans through IBSA. Two of them were told by Defendant Faller that he had personally been involving in funding two loans in Europe in the summer of '93." [42-1 at 22].

"[Numerous applicants] asked Defendant Faller the obvious question: Have you funded these loans before?...Faller's response was much like the one that his colleague Barbara Murray often gave. Yes, we have funded these loans before." [D.E. 42-1 at 44-45].

(T.R. May 24, 2000, p. 20 at 17-25, p. 42 at 24-p. 43 at 4). The Government successfully argued that IBSA had never funded loans, that Petitioner knew IBSA had never funded loans, and that Petitioner nevertheless continued to solicit advanced fees using fraudulent sales tactics:

"Rolan Colon and James Faller had a conversation, and in that conversation [Faller was told] that none of the clients in Stamford, none of the Stamford loans had been funded...Mr. Faller was not fazed by these revelations... [and] went back to doing what he did best: Marketing loans and inducing clients to pay advance fees with claims that Richard Adam had funded loans or that he himself and his colleagues had previously funded loans." [D.E. 42-1 at 46]

(T.R. May 24, 2000,p.44 at 1-18). The Government also successfully conveyed to the jury that Petitioner, Mr. Colon, and another colleague formed First Quantum International ("FQI") for the purpose of conducting a similar advanced loan scheme.

The crux of the Government's case was that Petitioner falsely promised his prospective loan applicants that loans had been funded to other applicants:

> Q. Did you and Mr. Faller have any conversation about prior successes in funding loans?
>
> A. Yes, we had asked if they had done this kind of thing before and he indicated that they had.
>
> Q. So he told you that they had funded loans previously?
>
> A. Yes

Testimony of Robert Cameron (T.R. May 11, 2000, p. 144 at 10-16)

> Q. What if anything did Mr. Faller states to you he had funded other loans in the past as to funding?
>
> A. It was easy loan. He had made loans for billions of dollars.

Testimony of Kent McElhaney, (T.R. May 17, 2000, p. 521 at 1-4).

> Q. Prior to the conclusion of the meeting did you have occasion to discuss with Mr. Faller whether or not he was aware of any loans that had been previously funded?
>
> A. Yes. He said many were funded in the Fort Lauderdale office.
>
> Q. Did you ask him for the names of any persons that had been funded?
>
> A. He said that due to confidentiality he could not give this out.

Testimony of Steven Vergote (T.R. May 17, 2000, p. 470 at 7-16). Put another way, the Government's theory was not that the loans were impossible to fund, but rather that the Petitioner lured his victims with promises of past successes at funding when, in truth, no would-be borrowers ever received loan funding.

Petitioner was sentenced in February, 2003 to 24 months in prison, followed by three years of supervised release. Petitioner appealed and the Government cross-appealed.

On January 20, 2006 the conviction was upheld but the sentence was vacated. The Court held resentencing of Petitioner on April 20, 2006, and the Government again appealed the Petitioner's sentence. The Eleventh Circuit Court of Appeals dismissed the Government's appeal with prejudice on September 20, 2006, finalizing Petitioner's sentence. [D.E. 70].

B. ***The "Perez Documents" and "Post –Perez Documents"***

In July, 2003, approximately three years after Petitioner was convicted, Maria Perez, Esq., counsel for lead defendant Richard Adam, went to the United States Attorney's Office in West Palm Beach for a discovery conference.[4] While Ms. Perez was reviewing boxes of documents she came across material that was not bate stamped, leading her to believe that this material was never disclosed to the defense. The material consisted of thousands of pages of bank records and interviews of government witnesses, including FBI 302s and notes from the prosecutor. [D.E. 5]. Ms. Perez copied these documents ("Perez Documents") and notified Petitioner's counsel of her discovery. Petitioner's counsel finally obtained copies of the Perez Documents in August, 2004.

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[4] Mr. Adam was arrested in Canada, but fought extradition and was not tried with Petitioner.

Not only does Petitioner maintain that the Perez Documents contain exculpatory evidence, but also that the Perez Documents reference *additional* exculpatory evidence. Over the next several years, Petitioner gradually recovered the "fruit" of the Perez Documents ("Post-Perez Documents")

In reviewing the new material, it is clear that over 5,000 of those documents contained *Brady* material. Through those 5,000 documents containing *Brady* material, Faller and Murray have been led to an additional 20,000 documents with contain *Brady* material...The documents recovered thus far number over 70,000 however, Faller has culled the *Brady* material down to approximately 20,000.

[D.E. 68 at 1-2].

The Government insists Petitioner's attorneys were given full access and the opportunity to duplicate all discoverable evidence in the Government's possession. To support this position, the Government relies on the affidavit of Paralegal Gregory Arthur Baker, Assistant Federal Public Defender Robert E. Adler, and ex-AUSA James McAdams, III [D.E. 21-4,21-5,21-6]. Both Mr. Baker and Mr. Adler corroborate the notion that there was an open discovery process and that they complied with discovery rules.[5] Only

[5] Mr. Baker was assigned as a senior paralegal to the litigation support team with the United States Attorney's Office in West Palm Beach, Florida. From May 1998 to June 2000, he provided litigation support and document management

Mr. McAdams, however, speaks to the material at issue in this habeas petition, and he explains the origin of the Perez Documents:

> At the conclusion of the trial of Murray and Faller in 2000, Mr. Baker had organized all of the government evidence, reports, correspondence, etc. and placed those materials in boxes and filing cabinets in a room at the U.S. Attorney's Office. Interspersed among those materials was government work product, that is, notes by Mr. Hopkins and me, a fact that during the lapse of time prior to Adam's extradition I had forgotten. Accordingly, unintentionally, the government allowed Ms. Perez to review and duplicate those materials which were certainly beyond the scope of both the Court's discovery order and Rule 16 of the Federal Rules of Criminal Procedure.

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exclusively on the case of United States v. Adam, Faller, Murray, et al and reported to Senior Assistant United States Attorneys James G. McAdams and James Hopkins. Specifically, Mr. Baker was responsible for making case documents and other evidence obtained during the course of the Government's investigation and prosecution available to Petitioner and his co-defendants. He recalls multiple occasions when Petitioner's counsel visited the United States Attorney's Office in West Palm Beach for extended periods to review and copy case documents in the Government's possession.

Mr. Adler was an Assistant Federal Public Defender, and briefly represented co-defendant Rolan Colon before having to withdraw due to a client conflict. Mr. Adler recalls that he began discovery review at a government office where the discovery was housed in file cabinets. In his own words, it was a "very open discovery process in that I was given free access to the documents."

[D.E. 21-4 at 11]. In short, the Government acknowledges purposefully withholding the Perez Documents because, the Government posits, the Perez Documents were not subject to disclosure, and that the failure to produce the material did not violate the Federal Rule of Criminal Procedure or Petitioner's constitutional rights. With respect to the Post-Perez Documents, the Government maintains that they never had these materials in their possession and that they are not exculpatory in any event.

II. ANALYSIS

"A prisoner in custody under sentence...claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States...may move the court which imposed the sentence to vacate, set aside, or correct the sentence." 28 U.S.C. § 2255. Collateral relief under section 2255 "is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *Lynn v. United States*, 365 F. 3d 1225, 1232 (11th Cir. 2004) (citations omitted). Generally, only constitutional, jurisdictional, and fundamental error claims are properly raised in a section 2255 motion. United States v. Addonizion, 442 U.S. 178, 184-86, 99 S.Ct.2235, 60 L. Ed. 2d 805 (1979).

Petitioner asks this Court to vacate his conviction and sentence for Government violations of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (holding that the State's failure to provide defendant with favorable material evidence violates due process), *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed. 2d 104 (1972) (holding that a defendant's due process right is violated when the State knowingly allows false, material testimony to be presented at trial), and 18 U.S.C. § 3500 (the "Jencks Act") ("After a witness called by the United States has testified on direct examination...[the United States] shall produce any statement...which relates to the subject matter as to which the witness has testified.")

Petitioner raises other challenges to his sentence, such as ineffective assistance of counsel and prosecutorial misconduct [D.E. 2 at 4]. There is no basis to vacate his conviction on these particular grounds because Petitioner does not cite to a single case, and offers no credible argument to support these claims. The only argument in support of his claim for prosecutorial misconduct is the Government's failure to turn over *Brady*, *Giglio*, and Jencks material. In that same vein, he argues his lawyer was ineffective because the lawyer was not privy to this potentially exculpatory evidence, and could thus not effectively cross examine witnesses. As a practical matter, Petitioner's claims, if any lie in *Brady*, *Giglio*, and Jencks.

At its core, Petitioner's motion argues that the Perez Documents and Post-Perez Documents prove that he was a *victim* of the charged crimes, not a perpetrator.[6] We thus portion our discussion of Petitioner's section 2255 arguments in two. First, we review the Perez Documents , and explored whether the purported violations of *Brady*, *Giglio*, and Jencks warrant relief under section 2255. With respect to the Post-Perez Documents, we address whether the discovery of this new material warrants a new trial.

A. ***Perez Documents***

In part, the Perez Documents consist of documents related to Truman Bidwell, co-Defendant Murray's attorney from New York ("Bidwell Documents") [D.E. 26 at 68-83; D.E. 62-1 at 50-65]. The Bidwell Documents consist of letters and facsimiles to and from Mr.

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[6] To the extent Petitioner seeks relief for the late disclosure of documents the Government disclosed during trial, we reject that claim. Petitioner filed a motion for a new trial alleging that the Government withheld *Brady* and Jencks material. Judge Ryskamp, adopting Magistrate Judge Vitunac's Report and Recommendation, denied Petitioner's posttrial motion. Petitioner then appealed, and the Eleventh Circuit found no material conflict between the FBI witness statements and their testimony at trial. *Murray, et al.*, 154 Fed. Appx. At 743 ("[T]he district court did not err in refusing to grant a new trial on the basis of the allege Brady violations). In light of the fact that this issue has been reviewed by the Magistrate Judge, District Judge, and Eleventh Circuit, we find no authority that would entitle Petitioner a fourth bite at the apple. *See, e.g., United States v. Escobar-Urrego*, 110 F. 3d 1556, 1561 (11th Cir. 1997) ("[A] decision of a legal issue or issues...establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court.") (citations omitted).

Bidwell, Government counsel's notes form an interview with Mr. Bidwell, and a typed document of "statements attributable to Truman Bidwell."[D.E. 26 at 69-70]. Petitioner argues the Bidwell Documents contain "numerous FBI 302's of statements of witnesses who could have been called by Faller...[and they show] that Bidwell specifically told one client of IBSA that a loan had been funded, the virtual underpinning of the Government case that no one had ever been funded." [D.E. 26 at 15]. Furthermore, Petitioner maintains that the Bidwell Documents contradict the "false" trial testimony of Government witness Martin Hopwood. The Government responds that the material is not exculpatory because it does "nothing to reverse the fact that both petitioners had repeatedly told the borrow/victims that they knew that loans had been funded in the past and would be funded to them." [D.E. 6t1 at 6].

Additionally, Petitioner's motion includes a number of letters and documents from an attorney named Steven Brenners ("Brenners Documents") [D.E. 62-2 at 9-31]. Mr. Brenners sent letter to prospective IBSA borrower/victims assuring loan funding, although he apparently had no firsthand knowledge of the loan funding and only reiterated Richard Adam's promises. There is one handwritten note in particular that Petitioner points out, a facsimile sent from Mr. Brenners to Rolan Colon (a co-Defendant) that reads as follows. "Dear Rolan, [e]nclosed is the statute we spoke about. My review of the

statute indicates that since IBSA is licensed, everything is O.K. Steve (see § 687.14(4) and § 687.141)." [D.E. 62.2 at 9]. According to Petitioner, this facsimile is "the most compelling evidence of Faller's reliance on a good faith defense that he relied on lawyer's assertion that Adam and IBSA were legitimate." [D.E. 2 at 16]. Mr. Brenners was not a government witness, and the Government argues simply that the documents are not exculpatory and do not constitute Jencks material [D.E. 61-1 at 8].

Petitioner then focuses on material from the Luxembourg Police Department investigation of Richard Adam ("Luxembourg Documents"). [D.E. 26 at 52-65]. One Police report, according to Petitioner, " is yet another official document containing *Brady* material showing that the [Government] witness, Regis Hempel was in fact an originating partner of Adam and not a Luxembourg dignitary as he was introduced to the Jury by the Government." [D.E. 26 at 11-12]. Notably, the police report notes that Mr. Hempel actually had problems with Adam and resigned from IBSA. The Luxembourg Documents also contain an "interview of Luxembourg attorney Rene Weber where Weber tells the Government that he domiciled First Quantum in his office for Adam for a fee," a copy of a letter to the Luxembourg police showing all of the accounts of Adam at that particular bank, and bank checks issue by Adam to attorney Weber. [D.E. 26 at 12]. The Government's response to Petitioner's claim with respect to the Luxembourg Documents: "We are simply

at a loss to explain the potential relevance of these documents, much less how they could be deemed to be exculpatory for the petitioners" [D.E. 61 at 9].

We have reviewed the Perez Documents attached by Petitioner in support of his request for habeas relief, although we do not summarize each document individually. To recap, Petitioner argues that the failure to disclose the Perez documents constitutes violations of *Brady*, *Giglio*, and Jencks and warrants habeas relief under section 2255. We disagree

1. Brady

In order to safeguard a defendant's due process rights, certain types of evidence require disclosure. Among these is exculpatory evidence that is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963); *see, e.g. Moon v. Head*, 285 f.3d 1301 (11th Cir. 2002). This duty does not extend so far as to require disclosure of neutral, irrelevant, speculative, or inculpatory evidence, *see United States v. Lindsey*, 482 F.3d 1285 (11th Cir. 2007), , inference gleaned from the evidence, *see United States v. Flores-Sandoval*, 94 F.3d 346, 353 (7th Cir. 1996), evidence over which the government has no control, see *United States v. Shryock*, 342 F.3d 948 (9th Cir. 2003), or evidence that is available to the defense from other sources, *see United States v. Cook*, 170 Fed. Appx. 639, 640 (11th Cir. 2006). Evidence that the government failed to disclose to the defendant is considered

collectively, not item-by-item, in determining whether the materiality requirement of *Brady* was violated. *Kyles v. Whitley*, 514 U.S. 419, 436-37, 115 S. Ct. 1555,1567, 131 L. 3d. 2d 490 (1995); *McMillian v. Johnson*, 88 f.3d 1554, 1570 (11th Cir. 1996).

Strictly speaking, there are three main components of a "*Brady* violation": (i) the evidence at issue must be favorable to the accused, wither because it is exculpatory, or because it is impeaching; (ii) that the evidence must have been suppressed by the State, either willfully or inadvertently; and (iii) prejudice must have ensued. *See, e.g. Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. ct. 1963, 144 L. Ed. 2d 286 (1999)).[7] Prejudice is established if "a reasonable probability [exists] that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985). " The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the

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[7] The Eleventh Circuit has also portioned the Brady analysis into a four-factor test. In order to establish a Brady violation, a defendant must show: "(1) that the [Government possessed evidence favorable to the defense, (2) that the defendant did not possess the evidence and could not obtain it with any reasonable diligence, (3) that the prosecution suppressed the evidence, and (4) that a reasonable probability exists that the outcome of the proceeding would have been different had the evidence been disclosed to the factors are fully embodied in the three-pronged test once the additional principles governing *Brady* claims are taken into consideration.

constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-110, 96 S. Ct. 2392,2400, 49 L. Ed. 2d 342 (1976).

After a careful review of the Perez Documents, we find that the Government did not commit a *Brady* violation entitling Petitioner to relief under section 2255. *See Kyles*, 514 U.S. at 436-37 ("[T]he Constitution is not violated every time the government fails to or chooses not to disclose evidence that might prove helpful to the defense.") (citing *Bagley*, 473 U.S. at 675). Without more, a showing that the prosecution knows of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation. *Kyle*, 514 U.S. at 437. The Perez Documents were largely irrelevant, speculative, and, in some instances, actually inculpatory.[8] Furthermore, most of the documents were readily available to Petitioner's counsel for other sources, either through Petitioner's co-Defendants, or via public records requests.[9] Petitioner's argument that "the District Court could not properly apply the materiality analysis

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[8] For instance, a police report in the Luxembourg Documents reads: "Mr. Adam and his company IBSA, which moreover has offices in Stamford, Fort Lauderdale and Tampa, such as fraud, attempted fraud, forgery and used of forged bank records, and laundering of illegal funds." [D.E. 26 at 58-69]. Evidence questioning the legitimacy of IBSA is arguably damaging given Petitioner's involvement with the company.

[9] As an example, Murray's defense lawyer acknowledged having access to the Bidwell Documents: "There is no question that we had them and that we are not objecting to our lack of having them...in fact, the government counsel and I had discussed the Government's accessing them, and Government counsel was very forthright." [D.E. 61 at 6-7].

established in *Kyles* because the bulk of the newly discovered evidence has not been discovered, "is misplace. Logically, if the evidence has yet to be discovered, then it is impossible for this Government to have committed a *Brady* violation.

Assuming *arguendo* the documents had some degree of exculpatory and impeachment value, and that the only source of the material was via the Government, Petitioner fails to establish prejudice, i.e. that the trial result would have been different had the Government disclosed the Perez Documents. *Bagley*, 473 U.S. at 682. The Government's case focused on Petitioner's fraudulent solicitations to prospective loan applicants, but the Perez Documents in no way refute that charge. In this case, disclosure of the suppressed evidence to Petitioner would not have made a different result reasonably probable in the underlying trial. *Kyles*, 514 U.S. at 441. Consequently, we find no *Brady* violation, and deny relief pursuant to section 2255.

2. Giglio

Petitioner also claims he is entitled to habeas relief because the prosecutor knowingly used and exploited false testimony, a so-called *Giglio* violation. Under *Giglio*, a defendant's due process rights are violated when the prosecution knowingly fails to correct a material falsehood in the testimony of any witness. *See, e.g., Foster v. United States*, No. 05-CV-ORL-18KRS, 2007 WL 1655364, at *4 (M.D. Fla. June 7, 2007)(citing

Giglio, 405 U.S. at 153-54). This rule covers not only inculpatory false testimony, but also falsehoods tending to enhance to credibility of a witness. Id. To establish a *Giglio* violation, Petitioner "must establish that: (1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material—i.e., what there is 'any reasonable likelihood' that the false testimony 'could...have affected the judgment." *Davis v. Terry*, 465 F. 3d 1249, 1253 (11th Cir. 2006) quoting *Giglio*, 405 U.S. at 154).[10]

Petitioner targets several instances where the Government allegedly elicited false testimony, but in every instance misses the mark. For example, he claims the Martin Hopwood falsely testified that Mr. Bidwell did not have an opinion on the viability or legality of the loan transactions. [D.E.2 at 18]. This argument does not satisfy either *Giglio* prong. First, Petitioner fails to establish that the testimony was false or perjured. Second, the viability of the loan transactions was essentially a non-issue at trial. This testimony was ancillary to Government's position that Petitioner promised would-be investors that IBSA had

[10] Ordinarily, *Giglio* material falls under the umbrella of the *Brady* rule because impeachment material directly affects the credibility of a witness and the "reliability of a given 2d 1339, 1343-44 (S.D. Fla. 1999) (citing *Giglio*, 405 U.S. at 154). The issue of when *Giglio* material should be disclosed, however, is analyzed separately from Brady. *See Aiken*, 76 F. Supp. 2d at 1344. As a practical matter, the fact that this material surfaced post-trial essentially removes the distinction between *Brady* and *Giglio* violations.

previously funded loans. In fact, Mr. Hopwood acknowledged that he never met Petitioner, and at trial, he only offered adverse testimony against co-Defendant Murray. (T.R. May 5, 2000,pp. 129-130). We find no *Giglio* violation with respect to the testimony of Mr. Hopwood.

Petitioner alludes to other Giglio violations, but offers no support save for conclusory arguments. For example, he argues that it was imperative for the Government to place Faller at a particular meeting with Adam, and that "[t]o do this the government again enlisted the false testimony of Colon to show Faller was meeting at the Federal Reserve Bank with Adam and Colon in January, 1994, long after Faller had gone to the authorities." [D.E. 2 at 19]. Notwithstanding the failure to address how this testimony was "imperative" to the Government's case, Petitioner fails to illustrate how this testimony is inaccurate, much less false and misleading.

Petitioner has not pointed to any tangible *Giglio* violation for the other testifying witnesses. Although there are allegations that Dominick Maggio falsely testified about Petitioner's involvement with FQI, Petitioner provides no evidentiary support for this claim, and fails to address how the testimony of Mr. Maggio, even if false, would have affected the judgment in the underlying trial. Several witnesses testified that Petitioner falsely promised them that IBSA had funded loans before, and his rationale as to why the testimony warrants habeas relief is tenuous as best. For example,

with respect to the purportedly false testimony of Robert Cameron:

> Robert Cameron gave specific testimony that Faller had told him numerous times that he, Faller had funded deals before. In part of Mr. Cameron's testimony, Cameron testifies that Faller and other codefendants of Faller's high-fived each other and said they had just funded another deal and Cameron made it clear to the jury that this is why he paid his advance fee...After Cameron testified at trial and left town the Government handed over his 302 interview. Absolutely no mention of high-fiveing (sic) anyone is in the interview or the 302.

[D.E. at 32-33]. Petitioner's argument that this is tantamount to a *Giglio* violation is simply unconvincing.

Under the *Giglio* rubric, we find no violation meriting a new trial under section 2255. Petitioner fails to establish that in the underlying trial, the prosecution knowingly used perjured testimony, or that the prosecutor failed to correct what was subsequently learned to be false testimony. *Terry*, 465 F.3d at 1253. Furthermore, he has not established the second prong under *Giglio*, that the testimony materially altered the jury's verdict. Therefore, we deny Petitioner's habeas motion on this ground.

3. Jencks Act

The Jencks Act mandates that a statement by a prospective prosecution witness to an investigative agent or the grand jury must be provided to the defense after the

witness has testified on direct examination. 18 U.S.C. § 3500; United States v. Jordan, 316F.3d 1215,1251 (1th Cir. 2003). In other words, to establish a Government violation of Jencks, Petitioner has to establish (i) that the prosecution took a witnesses statement, (ii) that the witness testified at trial, and (iii) that the Government subsequently failed to turn over the witness statement.

Although Petitioner attaches several witness statements in his motion to further his Jencks claim, he fails to establish that these statements were not timely disclosed by the Government. In one instance, Petitioner actually purports a Jencks Act violation for an interview that he conducted. [D.E. 72 at 1-2]. We find no violation of the Jencks Act that would necessitate granting the Habeas Petition.

B. Post-Perez Documents

Petitioner argues that the *Brady* material has led to the discovery of new evidence roughly 20,000 exculpatory documents, or Brady "fruit." The Eleventh Circuit

has concluded that section 2255 motions based on new evidence are subject to the standards generally applicable to motions for a new trial based on new evidence.

Lynn v. United States, 365 F. 3d 1225, 1237 (11th Cir. 2004).[1] There are five requirements

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[1] We could refuse to even address the new evidence in a section 2255 habeas petition. *See Monshaw v. United States*, No.

that a movant must satisfy before a new trial will be granted based on newly discovered evidence: (1) the evidence was discovered after trial, (ii) the failure of the defendant to discover the evidence was not due to a lack of diligence, (iii0 the evidence is not merely cumulative or impeaching, (iv) the evidence is material to issues before the court, and (v) the evidence is such that a new trial would probably produce a different result. *United States v. Jernigan*, 341 F. 3d 1273, 1287 (11th Cir. 2003) (citations omitted). Furthermore, motions for a new trial are highly disfavored, and we must use "great caution in granting a new trial motion based on newly discovered evidence." *Id.* (internal quotation marks and citation omitted). Petitioner would have to satisfy their five requirements to obtain a new trial based on new evidence if the issue was raised on direct appeal. *Lynn*, 365 F.3d at 1237. The standard is arguably high, but certainly no lower, for Petitioner to obtain a new trial based on new evidence through this section 2255 proceeding. *Id.*

Even if we assume that the Post-Perez Documents were discovered after trial and meet the first requirement for a new trial under section 2255, the documents fail at least one, if not all four of the remaining prong. *Id.* For example, Petitioner's First Supplemental Response [D.E. 30] argues that certain "new

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804-CV-18661-27TBM, 2006 WL 2327291 at *2 (M.D. Fla. Aug 9, 2006) (claims of newly discovered evidence should be raised in a motion for new trial pursuant to Federal Rule of Civil Procedure 33). Pursuant to Rule 33, the district interest of justice, however , we will still address that evidence here.

evidence," specifically FQI's chapter 7 bankruptcy file, proves that his co-Defendants were actually responsible for founding and maintaining FQI. He believes the bankruptcy file "would have destroyed the case in chief of the Government, as well as their witnesses who clearly testified falsely at trial."[D.E. 30 at 3]. However, bankruptcy filings are public record, and the FQI file could have been discovered with due diligence. At best, the evidence has slight impeachment value, but for the most part it is cumulative. It is not material to the issues before this court, considering that it does not undercut the Government's claim that Petitioner lied to his investors about having previously funded loans.

Above all, Petitioner fails to establish how this evidence would have produced a different result at trial. The Government's theory was that Petitioner, along with his co-Defendants, "engaged in a scheme to defraud by lying to the borrowers when they implied and in many cases outright told them that other borrowers had actually received substantial loans from the same European lender." [D.E. 61 at 3]. Petitioner has failed to show that any of these documents were material to the issues at trial, and that a reasonable probability exists that had the bankruptcy files been disclosed to the defense, the jury would not have convicted Petitioner. *See Lynn*, 365 F. 3d at 1237.

The remaining Post-Perez Documents similarly do not convince us to order a new trial. For instance, Exhibit 1 attached to

Petitioner's second reply [D.E. 62-1 at 34] is the corporate filing of FQI identifying Natalie Malfa as the Director. Petitioner believes this is proof that he was not associated with FQI. This document could have been discovered with due diligence, considering corporate filings are public record. Regardless, even if the jury was privy to this document, Petitioner fails to establish how it would have had a material impact on the verdict.

As another example, there are documents [D.E. 62-2 at 67-75] pertaining to Mr. Vergote, who testified that Petitioner fraudulently convinced him to pay an advanced fee for a loan. Petitioner argues that these documents shift culpability to Dennis Scheurmann, a Co-Defendant. Inculpatory evidence against Scheurmann does not qualify as exculpatory evidence for petitioner.

We reject Petitioner's argument that this new evidence warrants a new trial. *Lynn*, 365 F.3d at 1237. After carefully reviewing the record and examining all Post-Perez Documents, it is clear that the newly discovered evidence does not meet the threshold for relief under section 2255.

C. Petitioner is Not Entitled to an Evidentiary Hearing

Because it appears on the face of the habeas motion that Petitioner is not entitled to relief, there is no basic for an evidentiary hearing.

See Chiong v. United States, No. 02-CV-2237-MOODY, 2006 WL 923765, at *3 (M.D. Fla. Apr. 10, 2006) (citing Birt v. Montgomery, 725 F. 2d 587, 591 (11th Cir. 1984) (en banc), cert. denied, 469 U.S. 874, 105 S. Ct 232, 83 L. Ed. 2d 161 (1984)). Petitioner fails to meet that burden. We may deny relief without an evidentiary hearing if the motion and filed and records of the case reveal that the Petitioner is entitled to no relief. 28 U.S.C. § 2255)). "A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations. Nor is a hearing required where the Petitioner's allegations are affirmatively contradicted in the record." *United States v. Lactividal-Gonzalez*, 939 F. 2d 1455, 1465 (11th Cir. 1991), *rev'd on other grounds*, *Gozlon-Peretz v. United States*, 498 U.S. 395, 111 S. Ct. 840, 112 L.Ed. 919 (1991). The Court finds that the pertinent facts of the case are fully developed in the record before the Court, thus an evidentiary hearing is not required.

D. Petitioner Has Not Shown a Need to File Additional Documents

Notwithstanding the habeas petition [D.E. 2], the reply to Government's response [D.E.26], the supplemental brief [D.E. 30], the reply to Government's supplement brief [D.E. 62], and two notices of receipt of new Brady material [D.E. 63,72], Petitioner asks this court for leave to file even more exculpatory material stemming from the Perez Documents. The remaining documents Petitioner intends to file

"have never been seen by this Court and are not yet in the record." [D.E. 68 at 2]. Supposedly, this material proves that Petitioner was actually a victim in the fraud scheme, and that the trial testimony of every witness was either incomplete, or outright false. We deny Petitioner's request for several reasons.

Petitioner fails to differentiate between the "large volume of documents' he wants us to consider and the Post-Perez Documents we have already reviewed. Petitioner describes the new material he seeks to disclose, and it is virtually identical to material he previously submitted to the Court. Considering the Past-Perez Documents did not convince us to order a new trial, supplementary material would be futile. In that same vein, Petitioner obviously disclosed the most pertinent material to support his habeas motion, and *that* material does not warrant relief. Petitioner had an ample opportunity to disclose all pertinent documents in his five previous filings.

Petitioner does not need to submit more evidence to "prove his 2255 and [show that he is] an actual victim in this case." [D.E. 68 at 1-2]. Tellingly, Petitioner had enough evidence at trial to make this argument, as his attorney argued in closing, "Mr. Adam and Mr. Colon are pure, unadulterated absolute crooks, And they together joined in a conspiracy to defraud...[and] used people like James Faller to accomplish their goals." (T.R. May 24, 2000,p. 122 at 10-18). In this petition, he had even more evidence available, and an ample opportunity to disclose to this Court anything

he deemed pertinent. At this stage, additional material would merely be cumulative.

III. CONCLUSION

Based upon a thorough review of the record as a whole, the various motions filed by the parties, and a review of the underlying trial transcript, it is hereby **ORDERED** that the Motion for Leave to File Large Volume of Documents [D.E. 68] is **DENIED**. Further, we hereby **RECOMMEND** that Faller's Petition for Writ of Habeas Corpus [D.E. 2] be **DENIED**.

Pursuant to Local Magistrate Rule 4(b), the parties have ten days from the date of this Report and Recommendation to serve and file written objections, if any, with the Honorable Joan A. Lenard, United States District Judge. Failure to timely file objections shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the report and bar the parties from attacking on appeal the factual finding contained herein. *R.T.C. v. Hallmark Builder, Inc.*, 996 F. 2d 1144, 1149 (11th Cir. 1993); *LoConte v. Dugger*, 847 F. 2d 745 (11th Cir. 1988); *Nettles v Wainwright*, 677 F. 2d 404, 410 (5th Cir. Unit B 1982) (en banc); 28 U.S. C. § 636(b)(1).

DONE AND SUBMITTED in Chambers at Miami, Florida, this 22nd day of February, 2008.

/s/
EDWIN G. TORRES
United States Magistrate Judge

Copies provided to :
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UNITED STATES OF AMERICA, Plaintiff-Appellee, Cross-Appellant, versus BARBARA ANN MURRAY, JAMES STUART FALLER, II, a.k.a. Jarrett Rouge, a.k.a. Jim Faller, Defendants-Appellants, Cross-Appellees.

No. 03-10929

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

154 Fed. Appx. 740, 2005 U.S. App. LEXIS 21069

September 27, 2005, Decided
September 27, 2005, Filed

NOTICE: [**1] NOT FOR PUBLICATION

PRIOR HISTORY: Appeals from the United States District Court for the Southern District of Florida. D. C. Docket No. 97-06063-CR-KLR.

COUNSEL: For Barbara Ann Murray, Appellant: Matthew Thomas Davidson, Zuckerman Spaeder LLP, MIAMI, FL.

For James Stuart Faller, II, Appellant: Christopher A. Snyder, Vorys, Sater, Seymour and Pease LLP, COLUMBUS, OH; Michael S. Pasano, Zuckerman, Spaeder, et al., Miami, FL; David Freeman Axelrod, Vorys, Sater, Seymour and Pease, Columbus, OH.

For United States of America, Appellee: Lisette M. Reid, U.S. Attorney's Office, S.D. Florida, MIAMI, FL; Anne R. Schultz, U.S. Attorney's Office, MIAMI, FL; James G. McAdams, III, FORT PIERCE, FL; Jeanne Marie Mullenhoff, U.S. Attorney's Office - So. District of Fla., MIAMI, FL; Lisa T. Rubio, MIAMI, FL.

JUDGES: Before BARKETT and MARCUS, Circuit Judges, and GEORGE *, District Judge.

* Honorable Lloyd D. George, United States District Judge for the District of Nevada, sitting by designation.

OPINION

[*742] PER CURIAM:

Barbara Ann Murray and James Stuart Faller, II, appeal their convictions for conspiracy to commit mail and wire fraud, in violation of [**2] *18 U.S.C. §§ 1341* and *1343*, and conspiracy to launder money in violation of *18 U.S.C. § 1956(a)(1)(A)(i)*. Murray also appeals her conviction for wire fraud in violation of *18 U.S.C. §§ 1343* and *§ 2*. The government cross-appeals Murray and Faller's sentences, arguing that the grant of a downward departure was erroneous as a matter of law, and that the district court should have held each of the defendants responsible for the entire amount of laundered funds, resulting in higher sentences.

I. BACKGROUND

According to the case presented by the government, Richard Adam concocted a scheme to defraud people seeking venture capital loans. In exchange for advance payment of a substantial fee, Adam and his associates falsely promised to obtain multimillion dollar loans for would-be borrowers. Adam initially used the corporate name R.A.A. International Corporation and operated out of his condominium in Miami Beach, Florida. He subsequently hired Rolan Colon to solicit clients for loans, telling Colon that he had a trust in Europe that would fund the transactions. Although he initially believed Adam, Colon ultimately [**3] came to realize the fraudulent nature of the transactions.

In early 1992, Barbara Murray went into business with Adam, making him a partner in her Connecticut company in exchange for the payment of her furniture bills. The partnership operated under the name of Murray's existing business in Stamford, Connecticut, International Business Services

Alliance, Inc. (IBSA). In November 1992, Colon and Adam opened an office in Fort Lauderdale, Florida. And in January of 1993, Faller joined the company and opened IBSA of Tampa, Inc. Faller served as president of IBSA of Tampa, with Colon as vice-president, Adam as secretary, and Murray the treasurer.

By the time IBSA of Tampa opened, Colon knew that Adam's true objective in [*743] marketing these loans was to keep the advance fees without providing loans. After IBSA of Tampa was created, Faller, Colon, and Murray spoke almost every day. When Colon, Murray and Faller received advance fees from the victims, they forwarded the money to Adam, who by 1993 was living in Luxembourg. [2] Adam then remitted money to Murray, Faller and Colon for office expenses, salaries, bonuses and other expenses.

2 In March 1993, Adam opened IBSA of Luxembourg.

[**4] From July 1992 to January 1994 Murray received $ 3,446,000 in advance fees from prospective borrowers, promising the victims that they would receive loans to expand or start their businesses. If the loans Murray promised had been made, the trust would have made approximately $ 1.4 billion in loans. From March through December 1993, Faller received $ 1,053,500 in advance fees. Faller's promised loans amounted to over $ 144 million. In addition, Faller set up a company next to his IBSA office called First Quantum International (FQI), through which he ran an identical fraudulent scheme--but did not have to share the fees with Adam. Through the FQI scheme, Faller received $

439,800 in fee payments and promised loans totaling over $ 566 million which were never made.

Murray and Faller were indicted and convicted after trial in May 2000. Colon, who had pled guilty to the scheme, was a prime witness against Murray and Faller. [3]

> 3 Adam, the lead defendant, was arrested in Canada, but fought extradition and was not tried with Murray and Faller.

[**5] II. CONVICTION ISSUES

A. Brady Claims

Murray and Faller first argue that the government violated *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, by belatedly disclosing FBI notes which materially contradicted the testimony of key witnesses at trial which had established the defendants' awareness of the ongoing fraud.

Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), imposes a duty on the prosecutor to disclose material evidence that is favorable to the accused. *See United States v. Bagley, 473 U.S. 667, 674, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)*. The duty includes impeachment evidence as well as exculpatory evidence. *Id. at 676*. To prevail on a *Brady* misconduct claim, the defendant must establish that 1) the material at issue is favorable to the accused; 2) the material was suppressed by the State, either wilfully or inadvertently; and 3) prejudice ensued. *Banks v. Dretke, 540 U.S. 668, 691, 157 L. Ed. 2d 1166, 124 S. Ct. 1256 (2004)*. We review a district court's denial of

a motion for new trial based on *Brady* violations for abuse of discretion. *United States v. Fernandez, 136 F.3d 1434, 1438 (11th Cir. 1998).*

We have reviewed the statements [**6] and the trial testimony and find no material conflict between the FBI statements of these witnesses and their testimony at trial. Thus, the district court did not err in refusing to grant a new trial on the basis of the alleged *Brady* violations.

B. Jury Instruction On "Willful Blindness"

Murray next asserts that the trial court erred by instructing the jurors on "willful blindness," arguing that there was no evidence to support an inference of willful blindness. [4]

> 4 Faller adopts Murray's argument on this point but offers no independent argument.

The knowledge element of a criminal statute may be proved by demonstrating [*744] deliberate ignorance. *See United States v. Prather, 205 F.3d 1265, 1270 (11th Cir. 2000).* The deliberate ignorance instruction provides that "if [a defendant] has his suspicions aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge." *Id.* (quoting *United States v. Rivera, 944 F.2d 1563, 1570 (11th Cir.1991)).* [**7] We review the legal correctness of a jury instruction *de novo,* but defer on questions of phrasing, absent an abuse of discretion. *Id.*

Having reviewed this record, we find that the evidence demonstrated that Murray knew that her organization had taken in hundreds of thousands of dollars, and delivered absolutely nothing in return.

She had been warned about previous frauds perpetrated by Adam, but, rather than following through on the investigation into his background which she had begun, she terminated that investigation upon Adam's request. Nonetheless, according to the testimony of Colon, who recruited her into the scheme, she continued to assure clients that loans had been funded and never questioned him regarding the legitimacy of the program, or Adam's background. We find this evidence sufficient to support an inference that there was either knowledge that the scheme was fraudulent or a deliberate attempt to remain ignorant of that fact. Under the facts of this case, it cannot be said that the district court erred in giving this instruction.

C. Promotional Money Laundering Charge

Third, Murray and Faller argue that the trial court erred in refusing to dismiss [**8] their money laundering conspiracy convictions, because the use of money to pay rent and office expenses does not constitute promotional money laundering.

To obtain a conviction on a *§ 1956(a)(1)(A)(i)* promotional money laundering charge, the government must prove: "(1) the defendant conducted or attempted to conduct a financial transaction; (2) the defendant knew the property involved in the transaction represented the proceeds of unlawful activity; (3) the property involved was in fact the proceeds of the specified unlawful activity; and (4) the defendant conducted the financial transaction 'with the intent to promote the carrying on of [the] specified unlawful activity.'" *United States v. Carcione, 272 F.3d 1297, 1302 (11th Cir. 2001)* (quoting *18 U.S.C. § 1956(a)(1)(A)(i)*).

The gravamen of *§ 1956(a)(1)(A)(i)* is the intent to promote the carrying on of the specified unlawful activity. See *id. at 1303; United States v. Miller, 22 F.3d 1075, 1080 (11th Cir. 1994).* The defendants argue correctly that mere proof that a defendant engaged in a transaction with "tainted" money is not enough. [5] However, the [**9] record establishes that the money that Murray and Faller spent on rent, furniture, payroll, travel expenses, and office supplies was integral to creating an impression of legitimacy that would entice their victims to pay the substantial advance fees. Thus, there was sufficient evidence to establish that the money was spent with the intent to promote the fraudulent scheme, and the district court did not err by refusing to dismiss the conviction [*745] on this charge. [6]

5 As the courts have noted, the "money laundering statute" must not be turned into a "money spending statute." *See, e.g., United States v. Miles, 360 F.3d 472, 477 (5th Cir. 2004); United States v. Sanders, 928 F.2d 940, 946 (10th Cir. 1991).*

6 The cases Murray cites on the issue of concealment are inapposite. Concealment is a necessary element of money laundering only under *§ 1956(a)(1)(B)* (transactions designed in whole or in part to conceal the nature or source of the proceeds, or to avoid reporting requirements under state or federal law), not under *§ 1956(a)(1)(A)(i)* (transactions with an intent to promote the unlawful activity). Murray and Faller were convicted under the latter. Thus, it is irrelevant to our review whether she spent the money openly, or in a concealed manner.

[**10] ***D. Prosecutorial Misconduct***

Fourth, Murray and Faller contend that the prosecutor made improper closing remarks that deprived them of a fair trial. Because neither Faller nor Murray raised timely objections, the statements are reviewable only under the plain error standard. *United States v. Pendergraft, 297 F.3d 1198, 1204 (11th Cir. 2002).* Under the plain error standard, the prosecutor's statements created reversible error only if the statements were plainly wrong, affected the appellants' substantial rights, and seriously affected the fairness, integrity, or public reputation of the judicial proceeding. *United States v. Olano, 507 U.S. 725, 732, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993).* Under this standard, we find no reversible error. [7]

> 7 We note that Faller did contemporaneously object to one of the statements he argues constituted prosecutorial misconduct. However, we find that any impropriety in this comment was harmless, in light of the evidence as a whole and the trial judge's specific direction to the jury before closing arguments that "what the lawyers say is not evidence." *See United States v. Barshov, 733 F.2d 842, 847 (11th Cir. 1984).*

[**11] ***E. Cumulative Error***

Finally, Faller argues that the cumulative effect of errors at trial deprived him of a fair trial. In support of this claim, he cites the alleged *Brady* violations and improper closing argument statements discussed above, as well as an excessive pre-trial delay caused by the prosecution, the prosecution's use of material that he contends should have been

protected by attorney-client and work-product privilege, and the district court's refusal to present a separate "theory of defense" instruction to the jury on Faller's behalf.

To establish cumulative error, each alleged incident must constitute error in itself, though not necessarily so great as to warrant reversal. *United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993).* As discussed above, we find that there was no *Brady* error, and that the prosecution's closing statements did not constitute plain error. After reviewing the record, we further find that the trial court did not err in granting a two-and-a-half-year continuance to the prosecution. [8] Nor did the magistrate [*746] judge err in concluding that Faller failed to establish that any materials used [**12] by the prosecution were the confidential product of joint defense meetings. Finally, we find that it was within the district court's discretion to refuse to charge the jury with Faller's requested instruction, because the instruction actually given by the court substantially covered Faller's defense. *See United States v. Gold, 743 F.2d 800, 819 (11th Cir. 1984).*

8 The delay did not amount to either a statutory or constitutional violation of Faller's right to a speedy trial. The Speedy Trial Act, *18 U.S.C. § 3161 (c)(1),* requires that an indicted defendant be brought to trial within 70 days of the date of indictment. However, in a case involving multiple defendants, the speedy trial period begins to run when the last codefendant is indicted or first appears before a judge or magistrate judge. *Henderson v. United States,*

476 U.S. 321, 322 n.2, 90 L. Ed. 2d 299, 106 S. Ct. 1871 (1986). Because Faller's codefendant Adam fought his extradition to the United States, and had not yet appeared before a judge when Faller's trial began, the Speedy Trial time limit never began to run. Thus, there was no violation of that statute.

Nor is there error with regard to Faller's constitutional speedy trial claim. The government's attempt to apprehend a codefendant is a constitutionally valid justification for delaying the trial of an available defendant. *United States v. Hayes, 40 F.3d 362, 365 (11th Cir. 1994).* Further, Faller cannot show prejudice. Faller argues that he was prejudiced by the death of a Joe Denion, a witness who would have testified that Faller hired him in order to close loans (thus proving that Faller believed that loans would be funded). However, Faller was able to establish through other witnesses that he had hired Denion to close loans.

[**13] Because Faller has failed to establish that the violations he alleges were indeed errors, they cannot support a cumulative error claim.

III. CROSS-APPEAL OF SENTENCES

On cross-appeal, the government challenges Murray and Faller's sentences, arguing that the district court erred 1) by failing to hold the defendants responsible for the entire amount of loss caused by the foreseeable acts of others involved in the jointly undertaken fraud conspiracy, as required by *U.S.S.G. § 1B1.3(a)(1)(B);* 2) by granting

downward departures, since promotional money laundering is within the heartland of money laundering cases; and 3) by failing to rule on the government's PSI objections concerning Murray's role in the offense and Faller's attempts to obstruct justice.

Post-Booker, we continue to review the district court's initial calculation of a defendant's Sentencing Guideline range *de novo. United States v. Crawford, 407 F.3d 1174, 1178 (11th Cir. 2005).* After the district court has calculated the Guideline range, "the district court may impose a more severe or more lenient sentence as long as the sentence is reasonable." *Id. at 1179.* [**14]

In this case, the district court erred in calculating the amount of foreseeable loss, as required by *U.S.S.G. § 1B1.3(a)(1)(B).* "In the case of a jointly undertaken criminal activity" such as this one, *§ 1B1.3(a)(1)(B)* requires the judge to calculate loss based on "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." *Id.; see also United States v. McCrimmon, 362 F.3d 725, 731 (11th Cir. 2004)* ("When determining the loss amount attributable to a particular defendant convicted of a conspiracy offense, the district court must first determine the scope of criminal activity the defendant agreed to jointly undertake, and then consider all reasonably foreseeable acts and omissions of others in the jointly undertaken criminal activity." (internal quotations omitted)). Here, the district court overruled the government's objection to the loss calculation, determining that Colon *"controlled"* the Ft. Lauderdale office alone, and that he "didn't see that Faller had any

involvement in the Connecticut operation or Murray in the Tampa operation" (emphasis added). However, *§ 1B1.3(a)(1)(B)* [**15] requires the district court to determine whether these acts of joint undertakers were *reasonably foreseeable* to Murray and Faller. While we do not decide the factual question ourselves, we recognize that the legal standard of "reasonable foreseeability" of the acts of others does not require direct "control" or "involvement" in those acts. Because the district court appears to have based his findings solely on those latter factors, it erred by failing to apply the correct legal standard. *See McCrimmon, 362 F.3d at 728.*

The district court also erred by departing downwards to level 17, on the [*747] basis that the money laundering in this case, as incident to the primary fraud, was outside the "heartland" of money laundering cases. The district court reasoned that "Congress enacted the money laundering statute to deal with drug dealers who were in the process of laundering money to cover drug proceeds." However, our prior case law has established that money laundering incident to fraud is within the "heartland" of money laundering cases. *See United States v. Adams, 74 F.3d 1093, 1102 (11th Cir. 1996); United States v. De La Mata, 266 F.3d 1275, 1302 (11th Cir. 2001).* [**16] The district court erred by failing to determine whether the defendants' conduct in this case falls outside the "heartland" of offenses of money laundering incident to fraud. Our case law similarly prohibits departure on the district court's other stated basis, that of ensuring that the defendants did not receive a greater sentence than a more culpable co-conspirator. *See United States v. Chotas, 968 F.2d 1193, 1197-98 (11th Cir. 1992)* ("To

adjust the sentence of a co-defendant in order to cure an apparently unjustified disparity between defendants in an individual case will simply create another, wholly unwarranted disparity between the defendant receiving the adjustment and all similar offenders in other cases.").

Before the district court judge can address what he or she thinks would be a reasonable sentence, the court must correctly calculate a guideline sentence. Because the district court's calculation of Murray and Faller's guideline sentences was erroneous, we must vacate and remand for re-sentencing.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 06-60554-CIV-RYSKAMP/TORRES
(Criminal Case 97-6063-CR-Ryskamp)

JAMES STUART FALLER,II,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.
_____/

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2255

THIS CAUSE comes before the Court pursuant Report and Recommendation of United States Magistrate Judge Edwin G. Torres, dated February 22, 2008 **[DE 82]**. Respondent filed objections to the Report and Recommendation on March 7, 2008 **[DE 85]**. Before the Court is also James Faller's March 7, 2008 **[DE 84]** Motion for Hearing and Motion to Allow Extended Pleading.

The Court has reviewed the Report and Recommendation and has conducted a de novo review of the underlying record. The Court has, in conducting its review, considered the objections filled in Case No. 06-60544. It is hereby

ORDERED AND ADJUDGED that the Motion For Hearing in Motion to Allow Extended Pleading, filed March 7, 2008 **[DE 84]**, is DENIED. It is Further

ORDERED AND ADJUDGED that the Reported Recommendation is ADOPTED, AFFIRMED, and APPROVED. The petition for habeas corpus relief pursuant to 28 U.S.C. § 2255 is

DENIED. The clerk of Court shall CLOSE this case and DENY any pending motions as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida this 25th day of March, 2008.

/S/Kenth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-60554-CIV-RYSKAMP/TORRES
(Criminal Case 97-6063-CR-Ryskamp)

JAMES FALLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER DENYING MOTION FOR CERTIFICATE OF APPEALABILITY

THIS CAUSE comes before the Court pursuant to Movant's Notice of Appeal, filed April 4, 2008 **[DE 89]**, which the Court will treat as a Motion for Certificate of Appealability pursuant to Fed. R. App. P. 22(b) (2).

To merit a certificate of appealability, appellant must show the reasonable jurists would find debatable either (1) the merits of a constitutional claim or (2) both the merits of an underlying claim and the procedural issues he seeks to raise with respect to that claim. See 28 U.S.C. § 2253(c) (2); Slack v. McDaniel, 529 U.S. 473, 484, 120

S. Ct. 1595, 1604, 146 L.Ed.2d 542 (2000). Appellant has failed to satisfy either test set forth above. Accordingly, appellant's motion for a certificate of appealability, filed April 4, 2008 **[DE 89]** is Denied.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 5 day of April, 2008.

/s/
KENNETH L. RYSKAMP

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-11650-H

JAMES STUART FALLER, II,

Petitioner-Appellant,

Versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal for the United States District Court for the Southern District of Florida

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ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253 (c) (2).

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

File Stamped by Clerk of Court on September 2, 2008.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-11650-H

JAMES STUART FALLER, II,

Petitioner-Appellant,

Versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal for the United States District Court for the Southern District of Florida

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Before ANDERSON and MARCUS, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated September 2, 2008, denying appellant's motion for a certificate of appealability. Upon review, appellant's motion for reconsideration is DENIED as the appellant offered no new evidence or arguments of merit to warrant relief. See Fed. R. App.P. 40(a) (2).

28 U.S.C. § 2253 (c) (2); Strickland v. Washington, 466 U.S. 668, 687, 697, 104 S. Ct. 2052, 2064, 2069, 80 L. Ed. 2d 674 (1984); Maharaj v. Sec' y for Dep't of Corr., 432 F.3d 1292, 1312 (11th Cir. 2005); Lynn v. United States, 365 F. 3d 1225, 1237 (11th Cir. 2004); Spivey v. Head, 207 F. 3d 1263, 1283 (11th Cir. 2000).

No Signature

File Stamped by Clerk of Court on October 17, 2008